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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-252

JEROME DiMURO, LOUIS COLANGELO and ROBERT MANTICA,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

REPLY BRIEF FOR THE PETITIONERS

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Argument

The question presented by this petition for a writ of certiorari is:

> "Whether the Court of Appeals properly ruled the Government was not required to prove the existence of a single gambling business in a one-count indictment under 18 U.S.C. §1955" (Pet. 2).

The government responds — apparently acknowledging the requirement — that the district court repeatedly in-

structed the jury in words "clearly denoting a single business" (Br. for U.S. 7). The words relied on — "*a* business," "*an* illegal business," and "*the* business" are thus offered as sufficient substitute for expositive instruction on a factual issue recognized as dominating the trial and appeal (A. 3).

The response is untenable. The district court judge expressly ruled *against* the existence of the requirement his words are now offered as "clearly denoting" ("I am going to make it a rule of the case, the government's burden of proof is not to prove a single gambling business" (A. 3, n.3)). Even if the judge's intention were otherwise, use of the indefinite articles would import generality as much as singularity ("any" business, rather than "one"), as would the expression, "the business," which is descriptive of business *activity* as much as business *organization.*

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States,* 326 U.S. 607, 613 (1946).

Here, the court's intention was to omit rather than direct the requirement of singularity, and the words used were consistent with that intention.

The government also responds,

> ". . . . petitioners' requested instruction would have been erroneous, because it might have incorrectly suggested to the jury that a finding that petitioners' activities were not wholly integrated, and were thus to some degree 'separate,' would have precluded a finding that they were all engaged in one gambling business within the meaning of Section 1955" (Br. for U.S. 7).

The response is inappropriate. Defendants' requests were alternatively phrased to present directly to the jury as a requirement of the government's proof, that defendants' activities be sufficiently integrated to constitute a single business, and to leave to the jury resolution of the question as one of fact. The refusal so to instruct was—consistent with the law of the case previously announced—absolute.

As stated in the petition, the issue was thereby removed from consideration by the jury, with the result that any defendant who had gambling contacts with Santarpio in June thereby fused himself—as a matter of law—into a Section 1955 offense of indefinite duration with anyone else having like contacts, whether or not their activities, in June or thereafter, evidenced a single business. Thus, the government's response (Br. for U.S. 3, 4) renews its reliance on the November seizures from five different locations (*not* Santarpio's), notwithstanding petitioners' objections—never reached by the Court of Appeals (A. 18, n. 21)—that they represented separate businesses unconnected with Santarpio's June activities. Under the ruling of the district court judge and his instructions consistent with that ruling, it simply wouldn't matter.

Conclusion

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

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